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Supreme Court U.S.
FILED
DEC 2 2002
OFFICE OF THE CLERK

No. 02-426

IN THE
Supreme Court of the United States

TERESA BALLARD, ET AL.,
Petitioners,

v.

PHYLLIS GARRETT AND ADVANCE AMERICA,
CASH ADVANCE CENTERS OF ARKANSAS, INC.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARKANSAS

REPLY BRIEF OF PETITIONERS

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STATEMENT OF THE CASE

Despite Respondent Advance America's repeated assertions to the contrary, the Petitioners never "refused" to post the $ 750,000.00 bond ordered by the trial court (Opp. Brf., pp. 2, 5, 6and never "defied" that order (Opp. Brf., p. 6), both of which labels connote intentional acts of disobedience by the Petitioners.[1] As the record below clearly shows, the Petitioners - former payday lending customers of Advance America -- were *unable* to raise the $ 750,000.00 to $ 825,000.00 in cash and property required to comply with the order.

Advance America then proceeds to inform this Court that the issue is moot because the underlying trial court order requiring the bond was set aside on November 18, 2002 - the date their Opposition Brief was filed here. That statement is simply and patently untrue. As of the date this Reply Brief is being written, no trial court order to that effect has been found of record by the Petitioners after repeated inquiry, although an order is apparently being circulated. Moreover, if such an order existed, why was it not included in Advance America's Appendix? More will be said on this subject below.

The Petitioners were unaware of the trial court's October 2, 2002 order denying Garrett's Motion for Contempt until they received the Respondents' November 12, 2002 Joint Motion to Vacate Order Requiring Objectors to Post Supersedeas Bond by telecopier. On Friday, November 15 - while Petitioners' counsel was out of town - a notice arrived from the trial court for a telephonic hearing on the Joint Motion to be conducted at 9:00 a.m. on Monday, November 18. Petitioners prepared a written response to the Joint Motion and transmitted it by Telecopier to the trial court at

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[1] It should also be remembered that this so-called "supersedeas" bond was ordered in the absence any supersedeas order whatsoever.

approximately 8:30 a.m. the morning of November 18. **(Supp. App. 1a.)** Petitioners did not appear by telephone for the hearing because counsel mistakenly believed the trial court was initiating the call and, when counsel discovered otherwise and called the trial court, the hearing was concluded. As stated above, Petitioners have made repeated inquiries of the trial court, its staff, the trial court clerk's office and counsel for Advance America for a copy of any order resulting from that hearing and have been made aware of no such order being signed or entered by the trial court.

REASONS FOR GRANTING THE PETITION

The weakness of the Respondents' argument is evident from the form of their response... Garrett has waived her right to respond and Advance America has ignored the equal protection violation sharply focused before us by the Arkansas Supreme Court's denial of standing. Instead – as has been typical in these proceedings – procedural manipulation is being substituted for merit: If the Respondents can't win on the merits, they will blatantly attempt to deprive this Court of jurisdiction to hear the matter, *even* if they have to bend the facts and law a little to get it done.

The timeline of their attempt to moot this issue is evident as is their misrepresentation of fact concerning the trial court's order. Their presumption in being able to secure the order they sought through their Joint Motion to Vacate should also be noted, however: If their Opposition Brief was due to be filed on November 18 (the same day for which they obtained a hearing on their Joint Motion), their Brief *must* have gone to the printer containing the presumed fact that the requested order was obtained and entered.

The "fly in the ointment," however, was that the relief they sought from the trial court – once again – was clearly beyond what the trial court had authority to grant. The

Petitioners in their Response to the Joint Motion demonstrated this. Where in the past, they were able to obtain a supersedeas bond in the absence of a supersedeas order, or obtain approval of a settlement agreement without putting on any real evidence to show its fairness (other than some financial information submitted under seal and not subject to cross-examination), this time the trial court apparently thought better of it.

I. The Decision of the Arkansas Supreme Court Conflicts with Recent Precedent of this Court.

Advance America implies that Petitioners were untimely in raising the constitutional issues of standing and equal protection below. (Opp. Brf., pp. 4, 7.) It must be remembered that those issues were not presented until the Arkansas Supreme Court *dismissed* their appeal and denied the Petitioners an opportunity to be heard. They then timely raised those issues in their Petition for Rehearing to the Arkansas Supreme Court, which rejected those arguments.

Advance America also incorrectly suggests that this Court's decision in *Devlin v. Scardelletti*, 536 U.S. ---, 122 S.Ct. 2005, 153 L.Ed.2d 27 (2002), does not apply because we are dealing here with the question of appellate standing arising under ARK. R. APP. P. 8. (Opp. Brf., p. 5.) The Arkansas Supreme Court, however, distinguished *Devlin* because it dealt with FED. R. CIV. P. 23, while the instant case dealt with ARK. R. CIV. P. 23. (**App. A, pp. 12a-13a.**)

Advance America then attempts to justify the Arkansas Supreme Court's rejection of *Devlin* on the grounds that the appellant in *Devlin* did not have the ability to opt out of the settlement. Advance America implies that the Petitioners deserve to be denied their right of appeal below because they "attempt[ed] to intervene at the last minute, rather than

opt out of a settlement to which they objected."[2] (Opp. Brf., p. 9.) In the first place, this Court only committed *one sentence* in *Devlin* to the fact that the appellant did not have the ability to opt out of the settlement class. All of the remainder of the *Devlin* opinion went to the fundamental constitutional policies requiring that absent class members be given a right to be heard if they timely preserve their objections. This Court has never stated that non-intervening class members' only real option is to "take it or leave it." Indeed, such a position would be manifestly contrary to the history of class action practice, which was designed to permit persons with small individual claims to join together and seek an economically viable remedy. To prohibit them from appealing an unfair and inadequate class settlement if they have the right to opt out and pursue their small individual claim leaves them with no real remedy at all. Those who step forward and appeal are – in effect – doing so as representatives for the remainder of the class who will all benefit if the appeal is successful. This analysis is also consistent with this Court's reversal of the U. S. Court of Appeals for the Eighth Circuit's decision to dismiss an appeal for lack of standing[3] pursuant to *Devlin* that concerned an opt-out class.[4]

II. The Appellate Rule of the Arkansas Supreme Court Denies Equal Protection to the Petitioners and to All Other Similarly Situated Litigants.

Advance America completely ignores this aspect of the Petition for Certiorari. Perhaps it did so (and opted for attempting to moot the Petition, instead) because the Petitioners' position is so manifestly correct. Even if *Devlin*

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[2] Petitioners moved to intervene as soon as the trial court certified the class and notice of certification and settlement was given.

[3] In re General American Life Ins. Co. Sales Practices Litigation, 268 F.3d 627 (8th Cir.(Mo.) 2001)

[4] Henderson v. General American Life Ins. Co., 122 S.Ct. 2584 (Mem), 153 L.Ed.2d 773 (Jun 17, 2002).

did not apply to this situation, the fact that other parties in Arkansas are allowed to appeal similar orders while the Petitioners (and all who follow them) are not establishes a regime for the arbitrary denial of equal protection now and in the future, *especially* since the Arkansas Supreme Court published its opinion and intends for trial courts and litigants to rely on it hereafter.

III. This Issue is not Moot.

Not only is there no evidence that the trial court has set aside its original order requiring the bond (which would be objectionable in itself under Arkansas law), the precedent created by the Arkansas Supreme Court will continue to bind future litigants and trial courts.

Moreover, dismissal of this Petition would not necessarily leave Advance America and Garrett free to perform the settlement agreement since - as alluded to in the Petition herein (p. 7, fn. 2) - the Petitioners intend to bring that issue before this Court via a Petition for Certiorari.[5] The fact that Advance America and Garrett have voluntarily attempted to deprive this Court of jurisdiction by improperly (and only allegedly) vacating the initial order does not necessarily render the issue moot where it is capable of repetition. *See, e.g., Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 191-92, 120 S.Ct. 693, 709-10, 145 L.Ed.2d 610 (2000); *City News & Novelty, Inc. v. City of Waukesha*, 531 U.S. 278, 283-84, 121 S.Ct. 743, 746-47, 148 L.Ed.2d 757 (2001).

[5] This Petition, the anticipated Petition on the denial of their right to appeal from approval of the settlement agreement, and the Petition in *Ballard v. Martin*, No. 02-542, all deal with the recent adoption in Arkansas of procedural rules dealing with class action settlements.

IV. The Question Presented is Important.

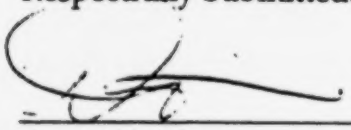
This issue presented is fundamental and important: Will class members who object and are ordered to post bonds on pain of contempt be allowed appellate review in Arkansas Courts? Do they have standing to do so? Are they denied equal protection and due process if appeal is denied them?

The Petitioners believe this questions - while fundamental - are essential to the developing law of class action practice in Arkansas and that it is important to "get it right" from the outset. This Court, with only a light hand on the tiller, can significantly influence the rights of absent class members here.

CONCLUSION

The Petitioners respectfully request this Court to enter its order reversing and remanding these proceedings to the Arkansas Supreme Court for proceedings in conformity with this Court's ruling.

Respectfully Submitted:



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PETITIONERS' SUPPLEMENTAL APPENDIX

Appendix A

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November 28, 2002

Via Facsimile Only: (870) 246-9378

Honorable John A. Thomas
CLARK COUNTY CIRCUIT COURT
P.O. Box 966
Arkadelphia, Arkansas 71923-0966

Re: *Garrett v. Advance America, Cash Advance Centers of Arkansas, Inc., CIV 99-152 (Clark County, Ark. Circuit)*

Dear Judge Thomas:

We write with respect to the Joint Motion to Vacate Order currently set for telephonic hearing this morning at 9:00 a.m. Thank you for allowing us to appear by telephone. We received this Motion by telecopier the morning of November 12 and were out of the office Friday for CLE when your call came in setting today's hearing. We did not have time to formally respond and ask the Court's indulgence in doing so through this letter. We were also not sent a copy of the Court's October 2 Order, but did acquire a copy of it after receiving this Motion. We also want to make sure a record is being made of today's hearing.

1. The Background

This is not the first time the Movants have asked you to do something not permitted by Arkansas law. For example, they tried to have this Court dismiss this the [sic] Objectors' appeal while it was pending in the Arkansas Supreme Court. They also tried to have this Court hold the Objectors in contempt while jurisdiction was still in the Arkansas Supreme Court. As we suggest below, you are now being asked to perform an act outside of your authority.

This matter is currently the subject of a Petition for Certiorari pending in the U. S. Supreme Court. In addition, the Objectors fully intend and are in the process of filing a Petition for Certiorari with regard to the dismissal of their appeal on the settlement agreement itself.

The justifications advanced by the Movants revolve around allegations that granting their Motion is in the best interests of the class in order to set aside the existing superseadas [sic]. However, as you already know, you have never entered a superseadas [sic] and the parties obligations under the settlement agreement are not ripe until all appeals are concluded. Despite allegations of willful misconduct by

the Objectors, their failure to post a $ 750,000.00 was clearly not willful (i.e., was not a "refusal" to comply)... They simply lacked the ability to do so, as anyone could see.

So why, after all their effort to subject the Objectors to contempt (i.e., to punish them for daring to contest these proceedings), do the Movants now ask you to simply set aside your original Order? What they tell you is that the purpose of the supersedeas bond was to protect the class, yet it was obvious to all that the only party able to provide such security was Advance America, who was never asked to do so. The real reason is that now that you have declined to hold the Objectors in contempt, the Movants simply don't want to go to the trouble of responding to the Objectors' Petition for Certiorari... Or perhaps they're concerned that the Objectors are right. In either event, they want you to act outside the purview of Rule 60 to attempt to deprive the U. S. Supreme Court of jurisdiction. They created this situation, but now they want to avoid its consequences when it has become. [sic]

2. The Law

The Movants' citation to Davis v. Davis, 291 Ark. 473, 725 S.W.2d 845 (1987) is disingenuous. That case involved a situation where the prevailing party had practiced a fraud upon the trial court in preparing a judgment in excess of that ordered by the trial court. Even though the judgment was upheld on appeal, the trial court set the judgment aside after the mandate issued in order to correct the fraud. The Arkansas Supreme Court approved that action *pursuant to ARK. R. CIV. P. 60(c)(4)* (grounds for setting aside judgment after 90 days). Surely the Movants do not contend that they practiced a fraud upon this Court in obtaining their own judgment!

To the contrary, ARK. R. CIV. P. 60(b) clearly controls this situation (court has plenary control over its orders for a

period of 90 days). Under that Rule, this Court is simply without jurisdiction to perform the act now requested of it. *See, e.g.,* City of Little Rock v. Ragan, 297 Ark. 525, 763 S.W.2d 87 (1989):

> To correct any error or mistake or to *prevent the miscarriage of justice* [emphasis in original], a decree or order of a circuit, chancery or probate court may be modified or set aside on motion of the court or any party, with or without notice to any party, within ninety days of its having been filed with the clerk. [Our emphasis.]
>
> We do not reach the merits of the argument because we have held frequently that the trial court loses the power to act under Rule 60(b) after ninety days from the filing of the judgment, decree or order with the clerk. Diebold and First National Bank of Wynne v. Myers General Agency, Inc., 292 Ark. 456, 731 S.W.2d 183 (1987); Mullen v. Couch, 288 Ark. 231, 703 S.W.2d 866 (1986); Burgess v. Burgess, 286 Ark. 497, 696 S.W.2d 312 (1985); McGibbony v. McGibbony, 12 Ark.App. 141, 671 S.W.2d 212 (1984); Harrison v. Bradford, 9 Ark.App. 156, 655 S.W.2d 466 (1983); Southern Farm Bur. Cas. Ins. Co. v. Robinson, 238 Ark. 159, 379 S.W.2d 8 (1964); Fitzjarrald v. Fitzjarrald, 233 Ark. 328, 344 S.W.2d 584 (1961); King & Houston v. State Bank, 9 Ark. 185 (1848). Here, while appellant's motion was filed on the 89th day and thus was timely, any power by the court to act on the motion lapsed with the expiration of the ninety days.

(Emphasis added.)

It has been more than 90 days since this Court entered its supersedeas Order. The Objectors pray the Court to overrule this Motion.

Thank you for your consideration.

Sincerely,

S/David G. Nixon .
David G. Nixon,
For the Firm

DGN/dgn

pcc: All counsel of record
Clients
Co-counsel